

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE GERARD BURGER,

Defendant-Appellant.

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UNPUBLISHED

March 17, 2005

No. 251788

Oakland Circuit Court

LC No. 03-190250-FC

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and third-degree fleeing and eluding a police officer, MCL 750.479a(3). He was sentenced as a habitual offender fourth, MCL 769.12, to concurrent prison terms of fifteen to forty years for the armed robbery conviction and three to ten years for the fleeing and eluding conviction. Defendant appeals by right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court improperly admitted other acts evidence related to his commission of a prior armed robbery. We disagree. We review a trial court’s decision to admit evidence for an abuse of discretion, but we examine the meaning of the Michigan Rules of Evidence de novo as questions of law. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

While the prosecution argues that the other acts evidence at issue was admissible to show a common plan, scheme, or system theory, it is more properly viewed as evidence of defendant’s identity as the perpetrator of the instant robbery based on the use of a similar modus operandi.<sup>1</sup>

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<sup>1</sup> In its argument, the prosecution largely discusses of the admissibility of other acts evidence to show a common plan, scheme, or system reviewed in *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000). *Sabin* involved a defendant who was convicted of first-degree criminal sexual conduct based on a charge that he sexually assaulted his thirteen-year-old daughter. *Id.* at 47-48, 52. There was no real question in *Sabin* that it was the complainant’s father who was alleged to have committed the sexual abuse. Rather, the real issue at trial in *Sabin* was whether the alleged sexual assault actually occurred. In the present case it was effectively undisputed that the crime actually occurred. The issue at trial was whether the prosecution established defendant as the perpetrator of the crime. In concluding that the other

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Other acts evidence is admissible to show identification through modus operandi when there is substantial evidence that the defendant committed the similar act, some “special quality” of the act tends to prove the defendant’s identity, the evidence is material to the defendant’s guilt, and the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

We conclude that the trial court did not abuse its discretion by admitting the other acts evidence regarding the armed robbery defendant previously committed because it could reasonably be viewed as constituting modus operandi evidence indicative of defendant’s identity as the robber in the present case. First, there are many phrases a robber could use to demand money from a cashier. Here, the testimony indicated that defendant in the prior robbery and the perpetrator of the present robbery each used the phrase “this is a stick up.” The trial court plausibly viewed the use of this phrase as rather unusual and thus deemed it to be a significant similarity. Further, the circumstances of the two robberies are quite similar in that testimony indicated that each was committed at a gas station/convenience store in the early morning by a white man whose face was partially covered by a hat, who was alone, and then escaped in a getaway vehicle parked near a gasoline pump. Accordingly, the trial court did not abuse its discretion by admitting the testimony regarding the prior robbery because it could reasonably be viewed as having probative value in increasing the probability that defendant was the perpetrator of the charged robbery in this case. See *Ho*, *supra* at 185-187 (concluding other acts evidence regarding a prior robbery was admissible when “the similarity in the crimes pointed to defendant as the perpetrator of this crime”).

Further, any possible error in admitting the other acts evidence does not warrant relief under the test for preserved nonconstitutional error because it is not more probable than not that the admission of this evidence was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The evidence presented at trial that defendant was stopped in the general area of the robbery shortly after it occurred in a pickup truck matching the description given by Steven Goble, the cashier of the robbed business, that defendant fled when asked if he were in the area of the robbery, and that a knife was found in defendant’s pickup truck was strong evidence that he was the person who committed the robbery. Based on this strong evidence of guilt, we believe that it is more probable than not that defendant would have been convicted of the charges at issue even without the other acts evidence at issue. Thus, he is not entitled to relief for any nonconstitutional error in the admission of the other acts evidence.<sup>2</sup>

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acts evidence at issue in *Sabin* was admissible, our Supreme Court stated that it was “probative of whether the charged act was committed.” *Id.* at 63-64 n 10. But to differentiate between evidence of a common plan, scheme, or system and evidence of a modus operandi to show identity, the Court also indicated that “the necessary degree of similarity” between the charged and uncharged acts is less in the common plan context than is needed to show identity. *Id.* at 65. Thus, principles articulated in cases such as *Sabin* regarding the minimum required similarity for admission of other acts evidence to show a common plan, scheme, or system are less helpful in the present context because a higher degree of similarity is required to admit other acts evidence to show a person was the perpetrator of an act that undisputedly occurred.

<sup>2</sup> Defendant only meaningfully argues that the admission of the other acts evidence violated  
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Defendant also argues that his trial counsel provided ineffective assistance of counsel by (1) failing to object to the prosecutor asking Goble whether defendant looked like the man who robbed him, and (2) by failing to ask the trial court for an instruction on identification testimony. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient in that counsel made an error so serious that he failed to perform as the "counsel" guaranteed by the Sixth Amendment, and (2) a reasonable probability that, but for counsel's error, there would have been a different result at the proceeding. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

During Goble's direct examination, he replied affirmatively when asked by the prosecutor whether defendant looked like "the man who robbed you that night." Trial counsel did not object to this question or answer. But shortly thereafter, on cross-examination, trial counsel elicited that Goble was not sure that defendant was the person who robbed him. During Goble's cross-examination, counsel also elicited that Goble at both a photographic and a corporeal lineup had identified someone else. Consequently, a strong presumption exists that counsel's performance constituted sound trial strategy. *Id.* at 600. By allowing Goble to testify that defendant looked like the robber, trial counsel was able to highlight the fact that Goble had previously identified others as having committed the robbery. This certainly cast doubt on the credibility or accuracy of Goble's recollection and identification of defendant. Accordingly, we conclude that trial counsel's failure to object to the relevant question or answer was in the realm of reasonable trial strategy and was not deficient performance that constitutes ineffective assistance of counsel. Similarly, trial counsel's failure to request an instruction on identification could reasonably be viewed as sound trial strategy because counsel could reasonably fear that such an instruction might leave the jury with the impression that they should conclude that Goble actually identified defendant as the robber when in fact he did not do so.

Further, even if trial counsel's performance were deficient in either or both of the ways defendant claims, we would still conclude that defendant has not established an ineffective assistance of counsel claim because there is no reasonable probability that had counsel

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MRE 404. Defendant's brief on appeal includes a one sentence statement that, "Criminal defendants possess a due process right to a fair trial that should not be denied by admission of improper evidence." This brief argument is plainly insufficient to present a claim of constitutional error when the mere violation of a rule of evidence generally constitutes only nonconstitutional error. Accordingly, any claim of constitutional error regarding this issue has been abandoned by defendant's failure to meaningfully argue its merits. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) (appellant's "failure to properly address the merits of his assertion of error constitutes abandonment of the issue").

performed differently in either regard, the jury would have reached a verdict given the strong evidence of guilt discussed above. *Carbin, supra* at 600.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell